has befallen the promisor's prediction that he will only pay damages if he does not perform? Specific performance in equity and restitution at law give a pertinent answer to these questions.

Undoubtedly the promisor who cannot be compelled to perform his promise does have some definite legal capacity. It seems more accurate to describe this as a power,—a power to break the contract. As Professor Hohfeld has pointed out in a spirited article (FUNDAMENTAL LEGAL CONCEPTIONS, 23 YALE L. JOURN. 16, ff.), right and duty are correlative terms. There can be no right without a duty. But the correlative of power is liability. Thus the promisor may have the ability or power to alter the legal relations growing out of the contract, to create in himself a liability. The duty of the promisor is, with due respect to Justice Holmes, to perform his promise, but by the exercise of a power he may in certain cases convert this duty into a liability. The exercise of a power in such case is wrongful but effectual; for it is of the essence of a power that it may alter, divest, or create rights.

It is submitted, therefore, that neither the history of the common law nor logic sustains the proposition that there is no legal obligation to perform a contract or, conversely, that there is a right to break a contract. To support such a notion is to hark back to the later YEAR BOOKS which ascribe property (*propretie*) to the trespasser, even to the thief, because, forsooth, the owner has no action against the third hand. Cf. POLLOCK AND MAITLAND, *op. cit.*, II, 156, ff. The unhappy results of this vicious process of reasoning are sufficiently striking to warn us of the danger involved in a similar mistake today. W. T. B.

CONSTITUTIONALITY OF SEGREGATION ORDINANCES.—The effort of various southern states to segregate white persons and colored ones into mutually exclusive residential districts has received a final quietus, unless the Supreme Court of the United States shall reverse itself, by the decision in *Buchanan* v. *Warley*, handed down November 5, 1917. The suit in this case was for specific performance of a contract to buy land. The contract expressly stipulated that the buyer, a colored man, was not to be held to his purchase unless he had "the right under the laws of the state of Kentucky and the city of Louisville to ocupy said property as a residence." His objection to performance was based on the fact that an ordinance of the city forbade persons of one color "to move into and occupy as a residence" a house in any block in which a majority of houses were already occupied by persons of the other color. The ordinance expressly excluded from its operation persons who had already acquired the right of occupancy of a building or had, by previous rental, established the color of occupancy. The Supreme Court of Kentucky had held this ordinance to be valid and, because of the terms of the contract, a defense to the suit for performance. The Federal Supreme Court reversed this decision and declared the ordinance unconstitutional. The court comments upon the ordinance in some respects as though it denied rights to colored persons only, but the court's

opinion is not predicated on this, and the ordinance does in fact apply to both races alike.

The enactment would undeniably have restricted the use of property and limited the owner's normal ability to dispose of it. But the court expressly concedes that, "dominion over property springing from ownership, is not absolute and unqualified. The disposition and use of property may be controlled in the exercise of the police power in the interest of public health, convenience, or welfare." It predicates the invalidity of the ordinance upon the sole premise that the particular restraint in this case is not "due process". The court continually uses the phrase "due process" as though it were a unique quality, determinable in and of itself. The context shows, however, that it is given the customary meaning of reasonable promotion of the public welfare. For a criticism of the idea that "due process" is a unique characteristic of legislation, see 22 YALE L. JOURN. 519.

In holding the ordinance to be unreasonable the court not only reverses the decision of the state Supreme Court but is in conflict with the opinion of courts of other states. In *State* v. *Gurry,* 121 Md. 534, 47 L. R. A. (N. S.) 1087, 12 MICH. L. REV. 215 (1913), a similar residential segregation ordinance was held invalid, but only because it made no exception, in its operation, of rights of occupancy acquired before its enactment. As the court pointed out, it might have prevented one who was already the owner of a house, before passing of the ordinance, from afterward occupying it himself. To this extent the enactment was said to be unreasonable, but its main objective was declared to be quite within the legislative power to regulate property rights. It was acknowledged by counsel for both sides that there had been more or less friction resulting from the occupancy by colored people of houses in blocks theretofore white. "With this acknowledgment," said the court, "how can it be contended that the City Council, charged with looking to the welfare of the city, is seeking to make an unreasonable use of the police power, when it enacts a law which, in their opinion, will tend to prevent the conflict?" "* * * We are of the opinion that the object sought to be accomplished by this ordinance is one which properly admits of the exercise of the police power." In *Ashland* v. *Coleman,* 19 VA. LAW REG. 427, decided the same year, an ordinance making it unlawful for a person of one color to occupy as a residence any house in a block already occupied by a majority of householders of the other color, and excepting rights of occupancy already acquired, was held to be reasonable and valid. In *Carey* v. *Atlanta,* 143 Ga. 192, L. R. A. 1915D, 684; 13 MICH. L. REV. 599 a residential segregation ordinance was declared invalid. This opinion was predicated, however, not on the ground that residential segregation had no reasonable connection with the public welfare, but on the premise that the "due process" clause precludes any restriction of an owner's right to dispose of his property. The principal case expressly repudiates this premise. In another Georgia case of this year, *Harden* v. *Atlanta,* Ga., 93 S. E. 401 (Aug. 1917) an ordinance almost identical with that of the principal case was upheld as constitutional. This court said, "A reasonable restraint upon alienation of property by individuals not only pervades our statute law, but is found in our state Consti-

tution." The enactment in question the court declared to be a reasonable, proper and valid restraint, saying, "If it be justifiable to separate the races in the public schools in recognition of the peril to race integrity, induced by mere race association, then we cannot see why the same public policy cannot be invoked to prohibit the black and white races from living side by side. * * * An ordinance designed to accomplish this purpose will be upheld, notwithstanding that to some extent the use of property may be somewhat restricted * * *." And again, "We do not think the ordinance either unreasonable or opposed to the Constitution of this state or of the United States upon the grounds stated."

Statutes segregating the races in schools and conveyances are now of admitted reasonableness and constitutionality. *Berea College* v. *Kentucky*, 211 U. S. 45; *Plessy* v. *Ferguson*, 163 U. S. 537; *Hart* v. *State*, 100 Md. 595. In attempting to distinguish the residential segregation law from those allowing segregation in transportation, the court is evidently actuated by a feeling that property may be less readily subjected to restriction for the public good than liberty may be. This idea appears in *Ives* v. *So. Buffalo R. R. Co.*, 201 N. Y. 271 and is repudiated in such cases as *Noble State Bk.* v. *Haskell*, 219 U. S. 104. See also, 15 MICH. L. REV. 292.

After all this direct and emphatic expression of opinion that the ordinance was reasonably necessary and conducive to public welfare it is surprising that the Supreme Court should have declared it unreasonable and, therefore, unconstitutional. When both the legislative and judicial departments of four states have explicitly declared it reasonable, one can not pretend that it is "arbitrary" or "palpably and unmistakably in excess of any reasonable exercise of authority" or even that it is "clearly" unreasonable. In declaring the ordinance void without such obvious unreasonableness, the court has exceeded the limits of its privilege as fixed by judicial declaration ever since the right of review has been exercised. *Hayburn's Case*, 2 Dallas 409; *Calder* v. *Bull*, 3 Dallas 385, 398; *Sinking-Fund Cases*, 99 U. S. 700, 718; *Atkin* v. *Kansas*, 191 U. S. 207; *Lochner* v. *New York*, 198 U. S. 45, 68 (dissenting opinion); *Eubank* v. *Richmond*, 226 U. S. 137; *Schmidinger* v. *Chicago*, 226 U. S. 578.

Oddly enough, the two cases which the court cites in support of its decision that the ordinance can not stand, namely, *Booth* v. *Illinois*, 184 U. S. 425, and *Otis* v. *Parker*, 187 U. S. 606, are decisions upholding the respective enactments in question on the ground that, whatever the court may think as individuals, the enactments were not so "clearly and unmistakably" unreasonable that the court could override the legislature. While it is not probable that the court will change its mind in regard to residential segregation, such reversal of opinion would not be without precedent. In *Wright* v. *Hart*, 182 N. Y. 330, the court held a "bulk sales" statute unconstitutional, because not reasonably conducive to public welfare, despite the fact that similar statutes had been enacted in twenty other states. Eleven years later, in *Klein* v. *Maravelas*, 219 N. Y. 383, the court frankly admitted that "the decision in *Wright* v. *Hart* is wrong," and it upheld a "very similar" statute as reasonable and constitutional.

J. B. W.